

Before The
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Institutional Cost Contribution
Requirement for Competitive Products

Docket No. RM2012-3

REPLY COMMENTS OF THE PARCEL SHIPPERS ASSOCIATION

(May 7, 2012)

The Parcel Shippers Association submits these comments in reply to comments submitted by other parties in this docket and pursuant to Order No. 1108, January 6, 2012, and Order No. 1276. This docket addresses whether and how changes in competitive market conditions, the allocation of costs to competitive products, the number and volume of competitive products, or any other changes should impact the minimum appropriate share of institutional costs of the Postal Service that should be provided by competitive products. See Order No. 1108 at 3. A 2007 Commission review determined that competitive products, collectively, should contribute a minimum of 5.5 percent of the institutional costs of the Postal Service annually. Order No. 43, October 29, 2007, ¶¶ 3040-47; Rule 3015.7(c).

The comments submitted by other parties do not alter PSA's perspective that the Commission should make no change in the appropriate share requirement at this time.¹

¹ Initial Comments of the United States Postal Service on Proposed Rulemaking to Evaluate the Institutional Cost Contribution Requirement for Competitive Products, April 10, 2012 (USPS Comments); Comments by William C. Miller in Response to Evaluate the Institutional Cost Contribution Requirement for Competitive Products, April 10, 2012 (Miller Comments); Comments of the Public Representative in Response to Notice of Proposed Rulemaking to Evaluate the Institutional Cost Contribution for Competitive Products, April 10, 2012 (PR Comments); Initial Comments of United Parcel Service on

Postal Service Comments

In response to PSA's earlier Motion, the Commission made clear its review of the appropriate share "is not limited to reviewing competitive products' contribution at 5 year intervals" as required statute. Order No. 1276 at 4. Rather, it may review the level on its own initiative or on petition by an interested party at any time if "relevant circumstances materialize." *Id.*

In its comments, the Postal Service cautions that the current 5.5 percent level may be too high and urges the Commission "to give itself the authority to find, on a case-by-case basis, that contribution below 5.5 percent of institutional costs is statutorily 'appropriate,' based on the circumstances obtaining at the time of any shortfall," but concludes that "[t]aking all of these considerations into account, the Postal Service would endorse the Commission maintaining 5.5 percent as the appropriate contribution share. . . ." Postal Service Comments at 9-10. To the extent the Postal Service is signaling that the 5.5 percent level is appropriate for the time being, PSA agrees.

PSA does not support, however, the rule change the Postal Service proposes, i.e., to permit the Commission to excuse the Service's failure to recover the required level of appropriate costs "based on the totality of circumstances."² Presumably such a failure would be addressed as part of the annual compliance review process under subchapter V of chapter 36 of title 39, United States Code.

The annual compliance review process is already burdened by the breadth of the required review and statutory limits on its duration. The opportunity for interested parties

Notice of Proposed Rulemaking to Evaluate the Institutional Cost Contribution Requirement for Competitive Products, April 10, 2012 (UPS Comments).

² "Notwithstanding subsection (c)(1), should 5.5 percent of institutional costs not be recovered from competitive products, the Commission may determine, based on the totality of circumstances, that competitive products have nonetheless collectively covered an appropriate share of institutional costs." Postal Service Comments at 9.

to consider the numerous issues involved and comment on them is necessarily limited. Yet Commission findings in that process have important implications for the ability of interested parties to complain that the Postal Service is not complying with the law.³ The appropriate share level is a major safeguard in the statutory construct that separates essentially monopoly activities and revenues from competitive ones.⁴ While the margin by which “profits” from competitive products exceed the minimum required contribution has been small, and “relevant circumstances” or the “totality of the circumstances” may warrant Commission recognition that a change in the requirement is appropriate, PSA prefers this be done by separate rulemaking which would afford all interested parties a fuller opportunity to comment than can be had under the annual compliance process.

United Parcel Service Comments

United Parcel Service discusses its views on how the Commission’s current approach is not compatible with the Postal Service’s changing business model. See *e.g.*, UPS Comments at 3.⁵ The main difficulty is that it may be awhile before we know the

³ “(e) REBUTTABLE PRESUMPTION.—A timely written determination described in the last sentence of subsection (b) [a finding of compliance] shall, for purposes of any proceeding under section 3662, create a rebuttable presumption of compliance by the Postal Service (with regard to the matters described under paragraphs (1) and (2) of subsection (b)) during the year to which such determination relates.” 39 U.S.C. §3653(b). Cited section 3662 provides the complaint jurisdiction, procedures, and remedies for violations of various provisions of title 39. This includes the provision relating to the appropriate share level. See 39 U.S. C. §3662.

⁴ See UPS Comments at 2 (The appropriate share requirement is a major safeguard established by PAEA to ensure fair competition with the private package delivery industry. 39 U.S.C. § 3633(a). As the House Report states, “[U]nlike the unconstrained pricing flexibility recommended by the President’s Commission for competitive products, the bill imposes limited but important controls to protect the public interest from unfair competition.” H. R. Rep. No. 109-66, Part 1 (April 28, 2005) at 43. See also Order No. 1108 at 2 (“[E]stablishing a markup that is too low could give the Postal Service an artificial competitive advantage.”)). Because the appropriate share level is a “major safeguard,” PSA opposes the recommendation that it be done away with at this time. See Miller Comments at 15. PSA finds Miller’s analysis showing that in theory no safeguard is necessary because the Postal Service has a clear incentive to maximize contribution from competitive products to be interesting. More experience under the existing model, however, is needed to see if this theory holds for a Government entity such as the Postal Service.

⁵ There may be confusion about the flexibility of the current approach. UPS argues that the current approach limits the contribution of competitive products to 5.5 percent of institutional costs. See,

results of the changes that are in process or that may result from legislation now under active consideration by the Congress. Thus, while PSA welcomes future discussion of the suggestions put forth by UPS and other parties, now is not the time for change.

Conclusion

With the reassurance that the Commission may revisit the appropriate share requirement at any time in the future, and having had the benefit of the initial comments of other parties, PSA remains comfortable renewing its argument that now is not the time to change the existing requirement.

Respectfully submitted,

/s/

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e.g., UPS Comments, fn. 3. But PRC Rule 3015.7(c) states that 5.5 percent is the minimum contribution, not the maximum allowable contribution. If Competitive Product Fund accounting rules conflict with Rule 3015.7(c), they should be adjusted.